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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91172335
Party	Defendant Spiegelberg, John Spiegelberg, John 2416 Broadway Lubbock, TX 79401
Correspondence Address	ERIK J. OSTERRIEDER SCHUBERT OSTERRIEDER & NICKELSON PLLC 6013 CANNON MOUNTAIN DR # S14 AUSTIN, TX 78749-3311
Submission	Answer
Filer's Name	Erik J. Osterrieder
Filer's e-mail	ejo@sonlaw.com
Signature	/Erik J. Osterrieder/
Date	08/17/2006
Attachments	Answer and Defenses.pdf ( 7 pages )(26984 bytes )

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

TEXAS TECH UNIVERSITY,  
Opposer,

v.

JOHN SPIEGELBERG D/B/A  
RED RAIDER OUTFITTER,  
Applicant.

§  
§  
§  
§ OPPOSITION No. 91172335  
§  
§  
§ Serial No. 78/620,435  
§ Mark: WRECK 'EM TECH  
§ Pub. For Opp. Date: 6/27/06

ANSWER AND DEFENSES

Applicant John Spiegelberg, d/b/a Red Raider Outfitter (collectively, “RRO”), through the undersigned attorney, files this Answer and Defenses to the Notice of Opposition (“Notice”) filed by Opposer Texas Tech University (“TTU”).

In response to the first, unnumbered paragraph in the Notice, these averments are TTU’s factual representations requiring neither denial nor admission, but to the extent that a denial or admission is required, this paragraph is denied, save it is admitted that the application’s mark at issue in this opposition is currently at issue in the civil action referenced in the Notice, and that TTU concurrently filed a motion to suspend with the filing of its Notice.

1. As to paragraph 1 of the Notice, it is admitted.
2. As to paragraph 2 of the Notice, these averments are TTU’s factual representations requiring neither denial nor admission, but to the extent that a denial or admission is required, this paragraph is denied.
3. As to paragraph 3 of the Notice, these averments are TTU’s factual representations requiring neither denial nor admission, but to the extent that a denial or admission is required, this paragraph

is denied. Available USPTO online records show that this paragraph's referenced TEXAS TECH UNIVERSITY mark has a registration that disclaimed any trademark rights in either TECH or UNIVERSITY when used separate and apart from TEXAS.

4. As to paragraph 4 of the Notice, these averments are TTU's factual representations requiring neither denial nor admission, but to the extent that a denial or admission is required, this paragraph is denied.
5. As to paragraph 5 of the Notice, these averments are TTU's factual representations requiring neither denial nor admission, but to the extent that a denial or admission is required, this paragraph is denied. Furthermore, although the Notice at this paragraph references an "Exhibit B", there is no page or other form of definite demarcation indicating where Exhibit B is in the Notice.
6. As to paragraph 6 of the Notice, this paragraph is denied.
7. As to paragraph 7 of the Notice, these averments are TTU's factual representations requiring neither denial nor admission, but to the extent that a denial or admission is required, this paragraph is denied.
8. As to paragraph 8 of the Notice, these averments are TTU's factual representations requiring neither denial nor admission, but to the extent that a denial or admission is required, this paragraph is denied.
9. As to paragraph 9 of the Notice, this paragraph is denied.
10. As to paragraph 10 of the Notice, these averments are TTU's factual representations requiring neither denial nor admission, but to the extent that a denial or admission is required, this paragraph is denied.
11. As to paragraph 11 of the Notice, this paragraph is denied.
12. As to paragraph 12 of the Notice, this paragraph is denied except that the quoted language in this paragraph is admitted.

13. As to paragraph 13 of the Notice, these averments are TTU's factual representations requiring neither denial nor admission, but to the extent that a denial or admission is required, this paragraph is denied.

### DEFENSES

16. Failure to State a Claim – Any and all claims in the Complaint legally and/or factually fail to state claims upon which TTU can be granted and/or is entitled to relief.. With this notice, RRO reserve the right to make appropriate motions under Fed. R. Civ. P. 12(b) and 12(c).
17. Lack of Standing – The claims asserted and relief sought are barred because TTU is not the owner of any valid mark(s), whether registered or not, at issue.
18. No Likelihood of Confusion – RRO do not infringe and/or dilute any of TTU's alleged marks.
19. Prior Use as a Mark – RRO continue their prior use of any marks as compared to TTU's alleged use for the same.
20. Fraud– TTU's alleged marks are invalid because TTU committed fraud by representing to the Texas Secretary of State's Office and/or the USPTO, at the time of filing and/or during prosecution of TTU's application(s) to register its state and federal marks at issue, that TTU was entitled to seek registration for its one or more alleged marks. With intent to deceive, TTU intentionally and knowingly misrepresented that TTU possessed the right to use its applied for state and federally registered marks at issue in commerce, when used on or in connection with the goods and/or services, so as not to cause confusion, mistake, or to deceive when compared to other existing marks, such as those marks TTU knew were already owned and used by RRO as well others. As a

result, TTU's fraudulently procured, registered marks that may be at issue in this suit are invalid and unenforceable against RRO.

21. Genericness – TTU's alleged mark(s) at issue are invalid for genericness.
22. Merely Descriptive – TTU's alleged marks are invalid for mere descriptiveness without secondary meaning.
23. Fair use – RRO has engaged in fair use, which negates any alleged damage to TTU.
24. Nominative use – RRO has engaged in nominative use, which negates any alleged damage to TTU.
25. Parody – RRO has engaged in parody, which negates any alleged damage to TTU.
26. Laches – TTU has exhibited undue delay in asserting its alleged rights against RRO (as well as others), a delay causing prejudice to RRO.
27. Acquiescence – TTU has exhibited undue delay and/or conducted themselves contrary to its alleged ownership in asserting its alleged rights against RRO (as well as others), a delay and/or conducting causing prejudice to RRO.
28. Estoppel – TTU's claims are barred, in whole or in part, by its act or words.
29. Prosecution History Estoppel – TTU is estopped based on its representations in federal and state prosecution history files for its alleged marks.
30. Illegal Purpose – An old License Agreement, in whole or in part, that TTU may attempt to use in support of this Notice, is invalid and/or unenforceable because of anticompetitive

provision(s) in violation of antitrust laws. Specifically, TTU has violated and is violating 15 U.S.C. §§ 1, 2 (“Sherman Act”).

31. Unconscionability – The License Agreement, in whole or in part, that is referenced in a preceding paragraph, is invalid and/or unenforceable because of unfair and/or oppressive provision(s).
32. Want of consideration – The License Agreement, in whole or in part, that is referenced in a preceding paragraph, is invalid and/or unenforceable because of failure of consideration.
33. Mistake – The License Agreement, in whole or in part, that is referenced in a preceding paragraph, is invalid and/or unenforceable because at the time of its execution and thereafter, there was a unilateral or mutual failure in the meetings of the minds in regards to RRO’s use, rights, and privileges attendant to and associated with RRO’s intellectual property as compared to TTU’s alleged intellectual property under the License Agreement.
34. Ambiguity – The License Agreement, in whole or in part, that is referenced in a preceding paragraph, is invalid and/or unenforceable because at the time of its execution and thereafter, there was ambiguity in regards to RRO’s use, rights, and privileges attendant to and associated with RRO’s intellectual property as compared to TTU’s alleged intellectual property under the License Agreement.
35. Trademark misuse – TTU has used its trademark registrations to unfairly promote its alleged trademark rights, and, as a result, such registrations are unenforceable against RRO.
36. First Amendment – RRO has engaged in behavior protected by the First Amendment, which negates any alleged damage to TTU.

37. Waiver and/or Abrogation of Sovereign Immunity – TTU has no sovereign immunity for the claims and counterclaims arising in, during, and those filed after this action involving the same or related matters.
38. Lake of fame – None of TTU's alleged marks are famous.
39. Lake of dilution – RRO has not diluted any of TTU's alleged marks.
40. Unclean Hands – The claims asserted and relief sought by TTU are barred by the equitable doctrine of unclean hands.
41. Failure to Mark – TTU has failed to mark its goods and/or services associated with its alleged marks, and, thereby, evidencing no asserted trademark rights and/or alleged damages therefor.
42. No Business Injury – RRO failed to injure, in whole or in part, TTU's business reputation and/or tradename, especially since it is not a business by TTU's own admission in the Notice.
43. Negated Sponsorship, Approval, and/or Endorsement – RRO has attached tags to its merchandise indicating whether sponsorship and/or approval exists by TTU.

#### PRAYER

WHEREFORE, because TTU will be not be damaged by the registration of RRO's mark now under both application and opposition, RRO respectfully requests that the USPTO dismiss this pending opposition and allow RRO a registration for its mark, WRECK 'EM TECH.

Respectfully submitted,

Dated: August 17, 2006

By: /Erik J. Osterrieder/  
Erik J. Osterrieder

Schubert Osterrieder & Nickelson PLLC  
6013 Cannon Mtn. Dr., S14  
Austin, Texas 78749  
(713) 533-0494  
(512) 301-7301 (fax)  
[ejo@sonlaw.com](mailto:ejo@sonlaw.com)  
ATTORNEY FOR APPLICANT

CERTIFICATE OF TRANSMISSION

This is to certify that a true and correct copy of ANSWER AND DEFENSES is being transmitted, via ESTTA, to the Trademark Trial and Appeal Board, on the date of signing below.

Dated: August 17, 2006

By: /Erik J. Osterrieder/  
Erik J. Osterrieder  
Schubert Osterrieder & Nickelson PLLC  
6013 Cannon Mtn. Dr., S14  
Austin, Texas 78749  
(713) 533-0494  
(512) 301-7301 (fax)  
[ejo@sonlaw.com](mailto:ejo@sonlaw.com)  
ATTORNEY FOR APPLICANT

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of ANSWER AND DEFENSES was served on the date of signing below, on Opposer Texas Tech University, through their attorneys of record *via First Class Mail* in an envelope addressed to:

Kilpatrick Stockton LLP  
1100 Peachtree St., N.E., Suite 2800  
Atlanta, GA 30309-4530

Dated: August 17, 2006

By: /Erik J. Osterrieder/  
Erik J. Osterrieder  
Schubert Osterrieder & Nickelson PLLC  
6013 Cannon Mtn. Dr., S14  
Austin, Texas 78749  
(713) 533-0494  
(512) 301-7301 (fax)  
[ejo@sonlaw.com](mailto:ejo@sonlaw.com)  
ATTORNEY FOR APPLICANT